LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 3 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1393

JOHN NUCCIO, ROSARIO LUPO and
WILLIAM CURCURATO,

Petitioners,

—*v.*—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JEROME LEWIS
Counsel for Petitioners
250 Broadway
New York, N. Y. 10007

82 CASE PRESS INC., 421 HUDSON ST., N.Y.—OREGON 5-4540

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statement	2
Reasons for Granting the Writ	6
Conclusion	10

AUTHORITIES CITED

Cases

Arnstein v. Porter, 154 F. 2d 464	9
Bush v. United States, 375 F. 2d 602	9
Dyer v. MacDougall, 201 F. 2d 265	8
Ewing v. United States, 135 F. 2d 633 cert. den. 318 U.S. 776	8
Golliher v. United States, 362 F. 2d 594	9
Griffin v. United States, 336 U.S. 704	10
Hamilton v. United States, 140 F. 2d 679	9
Hoffa v. United States, 385 U.S. 293	8
Lyles v. United States, 272 F. 2d 910	7, 8
Pitts v. United States, 263 F. 2d 808, cert. den. 360 U.S. 919	10

PAGE

Remmer v. United States, 347 U.S. 227 8

Townsend v. Sain, 372 U.S. 293 6

United States v. Birnbaum, 373 F. 2d 250, cert. den. 389 U.S. 839 9

United States v. Dovico, 261 F. Supp. 862 (61 Cr. 813, opinion No. 30811, S.D.N.Y.) 7

United States v. Hawkins, 324 F. 2d 873 8

United States v. Keogh, F. 2d (decided Feb. 8, 1968) 6

United States v. Nuccio, 373 F. 2d 168, cert. den. 387 U.S. 906 ..... 2, 3, 4

United States v. Troche, 213 F. 2d 401 7

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2255 6

Rule

Rule 33, Fed. R. Crim. P. 6

IN THE

Supreme Court of the United States

October Term, 1967

No.

JOHN NUCCIO, ROSARIO LUPO and
WILLIAM CURCURATO,

Petitioners,

—*v.*—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioners, John Nuccio, Rosario Lupo and William Curcurato, pray that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Second Circuit entered on April 8, 1968, which unanimously affirmed the order entered in the United States District Court for the Eastern District of New York on December 15, 1967, denying, without an evidentiary hearing, petitioners' motion for a new trial on the ground of newly discovered evidence.

Opinion Below

The oral decision of the United States Court of Appeals for the Second Circuit was delivered on April 8, 1968. The Court did not render a written opinion.

Jurisdiction

The order and judgment of the United States Court of Appeals for the Second Circuit was entered on April 8, 1968.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented

Did the trial court err in refusing to conduct an evidentiary hearing on the disputed factual question of whether Henrypierre was pressured into falsely inculpating petitioners and in rejecting as unworthy of belief the affidavits from prisoners submitted in support of the motion while crediting, without the benefit of cross-examination, the affidavits submitted by Government Agents in opposition?

Statement

The indictment herein charged that petitioners had conspired with Georges Henrypierre and two other individuals to import narcotics into this country unlawfully. Henrypierre, who was not named as a defendant, became "the Government's chief witness at the trial" (*United States* v. *Nuccio*, 373 F. 2d 168). He identified each of the

petitioners as participants with him in the alleged conspiracy.

Petitioners denied these charges and challenged Henrypierre's testimony as perjurious. Henrypierre's credibility became the key issue in the case for, as the Court below aptly observed, "if Henrypierre's credibility was destroyed, almost nothing would remain of the prosecution's case" (*United States* v. *Nuccio*, 373 F. 2d 168, 173 n. 2).

In July 1967, while serving his sentence herein at the Federal Penitentiary in Atlanta, Georgia, petitioner Lupo learned from a fellow prisoner of new facts which, if established, would clearly reveal petitioners' innocence and the perjurious nature of Henrypierre's testimony. Lupo advised counsel of his discovery and counsel promptly communicated with the inmate involved, one Phillip J. Mainer.

Mainer furnished counsel with two affidavits, duly sworn to on September 5, 1967, and December 7, 1967, which alleged, in essence, the following facts:

He first met Henrypierre in February 1965 at the Federal Detention Headquarters, 427 West Street, New York, N. Y.; they were cellmates in "maximum security" for approximately three months; during this period, Henrypierre would frequently be summoned by Federal agents for interrogation; when he returned to the cell from these sessions he would be crying and in a highly emotional state; Henrypierre stated that the Federal agents would show him photographs of individuals whom they wanted him to identify as the men to whom he was to deliver narcotics; the agents told him that these men were named Nuccio and Lupo; Henrypierre said he recognized only one of the pictures

shown to him, that of a gambler in New York City whose name he did not know;* he had never heard the names of petitioners until the agents told them to him; he had never seen, and did not know Lupo or Nuccio.

Mainer further alleged that Henrypierre told him and other prisoners on several occasions that the agents were exerting pressure upon him in order to induce him falsely to inculpate petitioners as his accomplices; that the agents threatened to have him imprisoned for many years and to expose him to his mother as a homosexual; and that he greatly feared the threatened disclosure of his secret would so shock his mother as to endanger her life.

Counsel subsequently obtained from Mainer the names of the following Federal prisoners who also heard Henrypierre tell of the agents' attempts to pressure him into falsely identifying petitioners as his co-conspirators: Charles Mulhearn, Vincent Lynch and Michael Pizzo. Affidavits corroborating the statements by Mainer were obtained from Lynch and Pizzo. In a letter dated September 25, 1967, Mulhearn advised counsel that, "I go along with what Mr. Mainer says of Henrypierre and what he has told you," but stating that in view of his own background, he would not wish to take the witness stand.

On the basis of the foregoing information, petitioners moved for a new trial on the ground of newly discovered evidence and requested the court to set the matter down for an evidentiary hearing and grant the necessary compul-

---

* During the trial, petitioner Curcurato testified that he had met Henrypierre gambling, that he had repelled Henrypierre's homosexual advances toward him, and that Henrypierre threatened to "get him" for that (*United States* v. *Nuccio, supra*).

sory process for the attendance of witnesses. Counsel advised the court below that he intended to subpoena all of the aforementioned persons as witnesses at the hearing.

In opposition to the motion, the Government submitted affidavits of three Customs Agents, which denied that any pictures were shown to Henrypierre during his interrogation at West Street, denied that he had been threatened in any way, and denied that any promise of reward had been made to him in return for his cooperation. *Significantly, the Government did not submit an affidavit from Henrypierre denying the statements of Mainer and Mulhearn.*

Coincidentally, Judge Rayfiel had also presided at Mainer's trial and, during argument on petitioners' motion, he stated that Mainer had "one of the worst records that I have ever come across in 20 years of experience on this bench" (19)*. Judge Rayfiel continued by querying: "Am I to take the word of a man of that kind against the word of Government agents?" (20).

The prosecutor echoed these remarks, stating that the affidavits submitted in support of petitioners' motion "are all affidavits of convicted felons whose credibility certainly should be questioned and would completely disregard the sanctity of an oath. It would be ludicrous to put them on the stand because they would lie on the stand." He concluded his argument by pointing out that opposing affidavits were submitted by three Government agents, and that, therefore, "the motion should clearly be denied without the necessity of a hearing" (35).

---

* Numerical references in parentheses refer to pages of the transcript of the argument on petitioners' motion held on December 15, 1967, copies of which were submitted to the court below.

As noted above, the court denied petitioners' motion without benefit of an evidentiary hearing at which defense counsel would have had the opportunity to cross-examine the agents or Henrypierre, assuming that the Government would arrange for his presence as a witness.

Reasons for Granting the Writ

1. We wish to make clear at the outset that the relief petitioners are seeking from this Court is a vacatur of the order appealed from with instructions to the court below to remand to the District Court for an evidentiary hearing. The question of whether petitioners are entitled to a new trial is not presently at issue.

A movant under 28 U.S.C. § 2255 is, by statute, entitled to an evidentiary hearing "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." Similarly, "the federal court must grant an evidentiary hearing" when a petition for a writ of habeas corpus contains a substantial allegation of newly discovered evidence (*Townsend* v. *Sain*, 372 U.S. 293, 317). And in *United States* v. *Keogh*, F. 2d (decided Feb. 2, 1968) the Court below noted that the allegations in a petition for a writ of error *coram nobis* had only to "cross the rather low threshold [to entitle the petitioner] to an evidentiary hearing on his petition."

We respectfully submit that the same principles should apply in the case of a motion for a new trial on the ground of newly discovered evidence pursuant to Rule 33, Fed. R. Crim. P. This is the standard which courts have adopted to determine whether to hold a hearing in cases presenting

facts almost identical to those of the case at bar (*e.g.*, *United States* v. *Dovico*, 261 F. Supp. 862, 867-868).

In *Dovico, supra*, after defendant's conviction for narcotics violation, a motion was made for a new trial on the ground of newly discovered evidence. The motion was supported by the affidavit of one Plattner, a prisoner who stated that he was a fellow inmate at Danbury with one Gangi who had been indicted together with Dovico but who had pleaded guilty. According to Plattner, Gangi had told him that Dovico was innocent but that he, Gangi, had been dissuaded by government agents from testifying at Dovico's trial. In opposition to the motion the Government submitted affidavits from two Assistant United States Attorneys and two agents denying that any pressure had been exerted on Gangi to dissuade him from testifying, as well as an affidavit from Gangi denying the statements attributed to him by Plattner.

Notwithstanding these affidavits in opposition, Chief Judge Sugarman ruled that the "sharp conflict between Gangi and Plattner cannot be resolved on the papers" and granted an evidentiary hearing (see, 61 Cr. 813, opinion No. 30811 filed 1/29/65 S.D.N.Y.). In the case at bar, the Government did not even attempt to obtain an affidavit from Henrypierre. Clearly, a hearing was required.

In *United States* v. *Troche*, 213 F. 2d 401, Judge Dimock *sua sponte* ordered an evidentiary hearing on the allegations of the motion for a new trial, and in *Lyles* v. *United States*, 272 F. 2d 910, although the Government "stoutly resisted" the motion for a new trial, it consented to granting defendant's request for an evidentiary hearing. The trial judge nevertheless denied the motion without a hear-

ing. On appeal, his order was vacated and the matter remanded for an evidentiary hearing. The court noted that the witnesses' "personal demeanor and appearance on the witness stand may show more clearly whether there is or is not credible evidence discovered, since the trial which would call for granting the motion" (*Lyles* v. *United States*, *supra*, at p. 912).

Remmer v. *United States*, 347 U.S. 227, *United States* v. *Hawkins*, 324 F. 2d 873 and *Ewing* v. *United States*, 135 F. 2d 633, 638, cert. den. 318 U.S. 776, are further instances where evidentiary hearings were held on motions for a new trial on the ground of newly discovered evidence.

Where, as in the case at bar, a factual question exists which depends upon a determination of the credibility of the affiants, petitioners were entitled to have the Government agents appear before the court and to subject them to the test of cross-examination. As this Court has stated:

> "The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination" (*Hoffa* v. *United States*, 385 U.S. 293, 311).

It is well known that the "demeanor" of a witness is a part of the evidence and the trier of the facts "may, and indeed [he] should, take into consideration the whole nexus of sense impressions which [he] gets from a witness." (*Dyer* v. *MacDougall*, 201 F. 2d 265, 269). In this connection, it has been said

> "that as 'the appearance and manner of the witness' is often 'a complete antidote' to what he testifies, 'we cannot very well overestimate the importance of having the witness examined and cross-examined

> in the presence of the court . . .' a witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression." (*Arnstein* v. *Porter*, 154 F. 2d 464, 470).

The court below also erred in its readiness to credit the statements contained in the affidavits of the Government agents while rejecting as unworthy of belief the allegations of the prisoners' affidavits submitted in support of petitioners' motion. An agent's testimony is, of course, entitled to no weight different from that given any other witness simply because he is employed by the government (*Bush* v. *United States*, 375 F. 2d 602, 605 n. 6). Indeed, it has even been held proper for courts to instruct juries that the testimony of police officers should be received with extra caution because of their natural bias (*Golliher* v. *United States*, 362 F. 2d 594, 604). On the other hand, merely because an individual has an unsavory record is not sufficient reason to automatically discredit his testimony (*United States* v. *Birnbaum*, 373 F. 2d 250, 256, cert. den. 389 U.S. 839). In each case the trier of the facts should reserve decision until after observing the witness's demeanor and affording opposing counsel the opportunity to cross-examine. Petitioners were deprived of that opportunity.

An affidavit of newly discovered evidence in a criminal case "should be construed fairly to the accused" (*Hamilton* v. *United States*, 140 F. 2d 679, 681). Where the facts recited therein indicate that the evidence was unknown to the defendants at the time of trial; that it is material; that it would probably produce an acquittal; and that failure to learn of it was not due to lack of diligence on the part of

the defendants, a new trial is warranted (*Pitts* v. *United States,* 263 F. 2d 808, cert. den. 360 U.S. 919).

The affidavits submitted in support of petitioners' motion meet this test. If believed, they clearly reveal that the Government's chief witness committed perjury and falsely inculpated petitioners. As Mr. Justice Frankfurter noted in *Griffin* v. *United States,* 336 U.S. 704, 709, it would be "too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it." At the very least, the trial court should have held an evidentiary hearing on the issue raised by the affidavits. It should not have ruled against petitioners solely because it deemed the affiants unworthy of belief while crediting the untested statements of Government agents.*

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME LEWIS
Counsel for Petitioners

---

* As the Government noted in its brief in the court below (p. 10):

"The District Court . . . stated, in effect, that it did not believe the appellants' affiants but believed the Government's."

This determination should not have been made without a hearing at which the affiants could be subjected to cross-examination.